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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 534

ANTHONY A. CEFARATTI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

PETITIONER'S REPLY BRIEF ON JURISDICTION

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Opinion Below

The opinion of the Court of Appeals on respondent's appeal is not yet reported, but can be found in Record 15, et seq.

Jurisdiction

The judgment of the Court of Appeals was entered on November 6, 1952, (R. 25). The jurisdiction of this Court is invoked under Title 28, United States Code, 1254(1), and Title 28, United States Code, 2101(c).

Statutes Involved

The issue thus raised is to be determined with reference to Sections 1254(1), 2101(c), of Title 28 of the United States Code; Rules 37(b) (2) and 45(e) of the Federal Rules of Criminal Procedure; and Rule 26(a) of the General Rules of the United States Court of Appeals for the District of Columbia Circuit. The relevant portions of those Sections and Rules are as follows:

Title 28, United States Code, 1254.

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

Title 28, United States Code, 2101(c).

Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

Federal Rules of Criminal Procedure, Rule 37(b)(2)

Time of Making Petition. Petition for writ of certiorari may be made within 30 days after entry of the judgment or within such further time not exceeding 30 days as the Court or a justice thereof for cause shown may fix within the 30-day period following judgment. If the judgment was entered in a district court in Alaska, Hawaii, Puerto Rico, Canal Zone or Virgin Islands, the petition shall be deemed in time if mailed under a postmark dated within such 30-day period. As amended Oct. Term, 1948, effective January 1, 1949.

Federal Rules of Criminal Procedure, Rule 45(e)

ADDITIONAL TIME AFTER SERVICE BY MAIL. Whenever a party has the right or is required to do an act within a prescribed period after the service of a notice or other paper upon him and the notice or other paper is served upon him by mail, 3 days shall be added to the prescribed period.

General Rules of the United States Court of Appeals for the District of Columbia Circuit, Rule 26(a).

PETITION. A petition for rehearing may be filed with the Clerk, when accompanied by proof of service on the adverse party, within fifteen days after judgment or decision, unless the time is shortened or enlarged by the court or a judge thereof. Such petition must be printed and signed and forty copies thereof furnished. It must briefly and distinctly state its grounds, and be supported by a certificate of counsel to the effect that it is presented in good faith and not for delay. A petition for rehearing is not subject to oral argument, unless ordered by the court.

Questions Presented

(1) Was the time of petitioner within which to apply for a writ of certiorari extended when his motion for an extension of time in which to file petition for rehearing was denied on December 3, 1952 and notice thereof by mail was received on December 6, 1952, by virtue of Rule 45(e) of the Federal Rules of Criminal Procedure.

(2) Where a Court of Appeals treats an appeal by the United States from an order of suppression after indictment as a civil appeal, does the case then become a civil appeal for purposes of certiorari?

Summary of Argument

The contested issues for the Court of Appeals related to (1) the right of the Government to appeal from an order

of suppression after indictment and (2) the legality of the search and seizure.

On November 6, 1952, the Court of Appeals handed down its opinion holding that the Government had an appeal from an order of suppression in a criminal case after indictment and reversing the order of suppression.

On January 5, 1953, petitioner filed a petition for a writ of certiorari in this Court under Title 28 United States Code, 1254(1). Inadvertently, petitioner omitted to include Title 28, United States Code 2101(c). In the month of February 1953, respondent filed a memorandum suggesting that the petition for a writ of certiorari is out of time.

Petitioner submits that this Court has jurisdiction to entertain his petition for a writ of certiorari as a criminal appeal because notice of the order denying his extension of time to file petition for a rehearing in the Court of Appeals was not received until December 6, 1952, and Rule 45(e) of the Federal Rules of Criminal Procedure allows him an additional three (3) days to exercise a right or to perform an act when service is had upon him by mail.

Petitioner further submits that the Court of Appeals treated the Government's appeal as an appeal from an order of suppression before indictment and ignored the fact that the dismissal of the indictment by the Government was without prejudice to its declaration that it proposed to reindict petitioner if it was successful. Under these circumstances, petitioner believes that the appeal was a civil one and that he had ninety (90) days in which to petition this Court for certiorari under Title 28, United States Code, Section 2101(c).

Statement

Petitioner was arrested on September 23, 1950 and was indicted on October 16, 1950 for a violation of the Federal Narcotics Law (United States Code) Title 21, Section 174,

Title 26, Sections 2553(a) and 2554(a). The first two counts of the indictment charged a sale and concealment of twenty-five capsules of heroin on September 21, 1950. In the last two counts, he was charged with the purchase and concealment of ninety capsules of heroin on September 23, 1950.

The facts leading to the petitioner's arrest on September 23, 1950 as adduced at the hearing on the motion to suppress the evidence filed under Rule 41(e) of the Federal Rules of Criminal Procedure and based upon the fourth and fifth amendments to the Constitution of the United States, are as follows:

On September 21, 1950, Officer Joseph A. Gabrys of the Washington Metropolitan Police Department observed from the second floor of the Austin-Reynolds Printing Company which is at the rear of 1318 Twelfth Street, Northwest, a meeting in the rear of 1315 Thirteenth Street, Northwest, between one Harold Hallams, the informer named as the vendee in the first count of the indictment, and the petitioner Cefaratti. At that time he (Gabrys) witnessed a sale between the two which turned out to be heroin. There is no evidence that either Gabrys or Hallams knew the name of the defendant at the time of the sale of September 21 (R. 6). Pursuant to instruction from the Narcotics Squad Hallams made arrangements to meet the same man, identifed by name as Cefaratti after his arrest, at a specified hour on the Northwest corner of Thirteenth and "M" Streets, Northwest, on September 23, 1950, and to buy from him some narcotics drugs (R. 6, 7). This communication Hallams communicated to Gabrys (R. 6, 7). Hallams also had informed Gabrys that the man from whom he had made a purchase owned a cab (R. 8-9).

Accordingly, at the "arranged time" on September 23, 1950, Hallams was stationed on the Northwest corner (R. 8). Hallams met the petitioner at the "arranged time and

place", but did not purchase the narcotics because the police had not given him any money inasmuch as they (the police) intended to arrest the petitioner at this time. The petitioner was arrested in front of 1216 Thirteenth Street, Northwest, Washington, D. C. (R. 6), and searched. Upon learning the tag number of petitioner's car, some other officers found the car at or near Fourteenth Street and Thomas Circle, Northwest, and searched it, removing therefrom some papers and narcotics (R. 6). Officer Gabrys further testified that he searched the car when it was brought to Police Headquarters (R. 6).

The trial court granted the motion to suppress on November 10, 1950, but did not order the return of the property (R. 10). The Respondent filed a Motion for Reconsideration on November 15, 1950 (R. 13), which was denied without argument on December 1, 1950 (R. 14). On December 7, 1950, the Respondent dismissed counts three and four of the indictment (R. 14), and appealed to the United States Court of Appeals for the District of Columbia Circuit from the order suppressing the evidence. The Court of Appeals reversed the order of the District Court on November 6, 1952, treating the appeal by the United States as an appeal from an order to suppress before indictment (R. 20-21).

ARGUMENT

As a Criminal Appeal, the Motion for Extension of Time in in Which to File Petition for Certiorari Was Timely and Should Have Been Presented to the Court for Consideration.

The respondent has filed a Memorandum Suggesting that the Petition for a Writ of Certiorari is Out of Time. In this regard, petitioner was indicted in the United States District Court for the District of Columbia on four counts charging the sale, purchase and concealment of narcotics.

(R. 11-12). A motion to suppress evidence obtained by an alleged unreasonable search and seizure was granted on November 10, 1950, and rehearing or reconsideration of this order was denied December 1, 1950. (R. 10, 13-14). When the case was called for trial, the Government was granted leave to, and did dismiss counts 3 and 4 of the indictment (R. 10, 14.).

On appeal by the Government from the order suppressing evidence, the United States Court of Appeals for the District of Columbia Circuit reversed and remanded the case on November 6, 1952. (R. 25).

A timely motion[1] for an extension of time, in which to file a petition for rehearing, from November 21, 1952 to and including December 8, 1952, was filed by the petitioner on November 21, 1952. This motion was denied by the Court of Appeals on December 3, 1952 (R. 26-28). However, notice of the entry of such order was not received until December 6, 1952, at which time present counsel were engaged by principal counsel in the Court of Appeals to present a Petition for Certiorari to this Court. Present counsel are making their first appearance in this Court and have acted promptly and without delay. In this connection present counsel presented a motion for extension of time within which to file petition for certiorari on the morning of December 8, 1952 to Mr. *Edmund P. Cullinan, Assistant Clerk of this Court.* Mr. Cullinan informed counsel that the motion was out of time.

Rule 37(b)(2) of the Federal Rules of Criminal Procedure provide as follows:

> "Petition for writ of certiorari may be made within 30 days after entry of judgment or within such further

[1] Rule 26(a) of General Rules of the United States Court of Appeals for the District of Columbia Circuit.

time not exceeding 30 days as the Court or a justice thereof for cause shown may file within the 30-day period following judgment" . . .

Rule 45(e) of the Federal Rules of Criminal Procedure provides:

> "Additional Time After Service by Mail. Whenever a party has the right to do an act within a prescribed period after the service of a notice or other paper upon him and the notice or other paper is served upon him by mail, 3 days shall be added to the prescribed period."

If three days for service by mail (Rule 45(e)) were added to the 30-day period provided by Rule 37(b)(2) as time of making petition for certiorari, the motion for an extension of time in which to file petition for certiorari was presented in time on December 8, 1952.

Petition for Writ of Certiorari Is Timely for the Reason That This Appeal Was Treated as a Civil Appeal by the Court of Appeals.

The Court of Appeals thought that the problem presented by this appeal was new.

> "The precise question we have is apparently new. However, it is settled that not only an order granting *Burdeau* v. *McDowell*, 265 U. S. 465, *United States* v. *Branco*, 3d Cir., 189 F. 2d 716, but even an order denying, *Go-Bart Co.* v. *United States* 282, U. S. 344, *Perlman* v. *United States*, 247 U. S. 7, a motion made before indictment, to suppress evidence is final and appealable. Since the appellee was not under indictment when the appeal was filed and is not under indictment now, the present appeal has a good deal of resemblance to the appeal in the *Burdeau* case. However, our decision rests squarely on the *Cohen*, *Swift*, and *Stack* cases." (R. 20-21).

Thus it would appear that the Court of Appeals converted the respondent's appeal into a civil appeal inasmuch as the petitioner was not under indictment at the time the appeal was filed. Moreover, it appears that "resemblance" became a fact and the appeal *ipso facto* became a civil appeal.

Respondent now argues that this case presented a clear instance of an appeal by the Government in a criminal case. In its brief below, the Government states at page 16:

> ". . . In the case at bar, the United States is in precisely the same circumstances it was in in *Burdeau* v. *McDowell, supra.* No indictment is in existence against appellee. The Government has in its possession incriminating evidence against defendant which "in grand jury" will be part of the evidence against the accused, and may be used against him upon trial should an indictment be returned". In the instant case, the order of the District Court, pursuant to Rule 41 (e), renders the evidence inadmissible 'at any hearing or trial', just as the order in *Burdeau* v. *McDowell, supra,* rendered the evidence inaccessible to the Government by ordering its return. In principle, there is no distinction between the two cases."

This clearly presents a different point of view from that now put forward by the respondent. *Go-Bart Importing Co.* v. *United States,* 282 U. S. 344, and *Burdeau* v. *McDowell,* 256 U. S. 465, represent petitions for suppression filed before indictment. Interestingly enough both the opinion of the court below and the Government's memorandum proceed upon a discussion of the *Go-Bart and Burdeau* cases.

Petitioner submits that the court below treated this case as a petition for suppression of evidence before indictment, and inasmuch as it was so treated that he had ninety (90) days within which to petition this Court for certiorari under

the provisions of the United States Code, Section 2101(c). Thus it would appear that his petition is timely.

Conclusion

The petitioner submits that the Petition for a Writ of Certiorari is timely and should be granted.

Respectfully submitted,

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